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Perspective

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Two Steps Back — Rescinding Transgender Health Protections in Risky Times

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On June 15, 2020, the U.S. Supreme Court advanced the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) Americans by issuing a decision in *Bostock v. Clayton County* confirming that the prohibition on sex discrimination in employment in Title VII of the Civil Rights Act of 1964 applies to sexual-orientation and gender-identity discrimination. Yet only 4 days later, the Department of Health and Human Services (HHS) followed through with its plan to rescind protections for transgender and gender-diverse Americans in health care by publishing a final rule revising the nondiscrimination provision (Section 1557) of the Affordable Care Act (ACA) to remove all references to gender identity, sexual orientation, and LGBTQ people.[1] HHS argues that health care is different from employment, even though numerous federal courts, including the Ninth Circuit Court of Appeals in *Minton v. Dignity Health* (2019), have determined that the sex-nondiscrimination provision in the ACA should be read as broadly akin to the analysis in *Bostock*. In Donald Trump's United States, transgender people apparently do not have the same right as their cisgender counterparts to receive medically appropriate, patient-centered care — or, indeed, any health care at all.

Prior to HHS's announcement, trans and gender-diverse people already faced disparities in health and health care: as compared with cisgender people, they have higher rates of mood disorders, tobacco and substance use, and HIV and other sexually transmitted infections (STIs), for example, and lower utilization of preventive care services.[2] These disparities are fueled by pervasive structural, interpersonal, and individual-level stigma that prevents transgender people from obtaining access to effective and affirming health services. In a 2015 national survey, one third of transgender people reported having had a negative health care experience within the previous year.[3] Trans people encounter medical providers who are not knowledgeable about transgender health, and trans people are not infrequently denied not just care related to gender transition but even general health care services; a transgender nonbinary person we know was recently denied a routine exam and testing for STIs by a gynecologist who simply said her practice was "not seeing transgender patients right now." Transgender patients also report being intentionally misgendered and verbally harassed by health care providers, who may blame them (or their medically necessary hormone replacement therapy) for their own health conditions. And they face larger systems-level issues, such as electron-

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ic health records that have not been appropriately modified, which can cause delays in necessary sex-specific diagnostic or preventive services. Stigma — both enacted (resulting in discrimination) and felt — results in about a quarter of transgender people avoiding medically necessary care.[3]

Black and Latinx transgender people are especially likely to have suboptimal health care access, owing to social and economic inequities as well as racial biases in medicine. Compared with White transgender people, these populations have more unmet medical needs, have greater difficulty obtaining access to gender-affirming care, and are more likely to obtain hormones from nonmedical sources and to self-inject soft-tissue fillers for feminization, all of which contribute to worse health outcomes.

In 2016, a final rule implementing Section 1557 of the ACA explicitly prohibited discrimination on the basis of race, color, national origin, sex, age, or disability in health programs or activities that receive funding from the federal government, as well as in many health insurance plans. At that time, relying on longstanding case law, such as *Rosa v. Park West Bank* (2000), HHS determined that the sex-nondiscrimination requirement also provided protections on the basis of gender identity and sex stereotyping.

From the early days of the Trump administration, however, appointed officials made clear that the new administration rejected any interpretation of sex-nondiscrimination laws as providing legal protections to LGBTQ people. Less than a month after Jeff Sessions was confirmed as U.S. attorney general, the Department of Justice and the Department of Education rescinded guidance to public schools about their obligations to transgender students. The Department of Justice later also issued a memorandum instructing U.S. attorneys not to enforce sex-nondiscrimination laws on behalf of transgender people and argued to the U.S. Supreme Court that Title VII should not be understood to prohibit discrimination on the basis of sexual orientation or gender identity.

The new rule, a devastating revocation of protections by the federal government, comes amidst the pandemics of Covid-19 and anti-Black racism. Although an analysis of the disproportionate impact of Covid-19 and anti-Black racism on Black, Brown, and transgender populations[4] is beyond the scope of this article, the conjunction of these dangerous forces must not be overlooked. Under the current circumstances, HHS's announcement may be a death sentence for members of populations that the Trump administration has, for the past nearly 4 years, deemed expendable.

Soon after the publication of the revised regulation, multiple lawsuits were filed (including one by the Human Rights Campaign, where one of us works) challenging the revocation of protections, arguing that it represents an egregious overreach of executive power that puts members of already marginalized populations in life-threatening danger. These lawsuits endeavor to ensure legal recourse for transgender patients who experience discrimination and to send a broader message about the humanity of transgender people. Hearings for some of these lawsuits are scheduled for early August in Washington, D.C. and New York.

This legal effort represents but one stage of a much larger struggle. Even as increasing numbers of health care organizations create specialized transgender health clinics, the systemic change required to make trans patients welcome in all health care settings and to ensure that they are treated with dignity and receive the care they need remains elusive. Even in the face of discriminatory HHS guidelines, physicians have a professional and ethical obligation to provide all patients with the highest-quality care possible. Just as many clinicians and health care institutions are beginning to wake up to their own racism, they must also confront their own transphobia — and the potentially deadly intersection between the two.

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